No. 88-76

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CROCKER NATIONAL BANK, CROCKER PROPERTIES, INC., and PACIFIC GATEWAY ASSOCIATES JOINT VENTURE,
Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO,
Appellees.

On Appeal from the Supreme Court of the State of California

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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In the Jurisdictional Statement, appellants demonstrated that the Takings Clause issue presented in this appeal—whether a city may use a lump sum development fee to shift an inordinate share of a public burden to a limited and identifiable class—presents a novel and substantial question of federal constitutional law. Although appellees argue that the decision below does not conflict with the decision of any other lower court, they cannot dispute that the legal issue is a substantial and important one that never has been addressed by this Court and that will recur.[1] In view of the importance of the constitutional

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[1] Appellees also suggest that the case is not worthy of review because a decision in this appeal "will only affect [appellants], and

question—one of the indisputably "hottest issues in the land use arena" [2]—this Court should note probable jurisdiction and set the case for plenary briefing and argument.

A. The TIDF Ordinance Constitutes An Impermissible Shifting of Public Burdens To Particular Individuals

1. Under the TIDF ordinance, the city has shifted to a small and discrete class of property owners the costs deemed necessary to continue to subsidize transit fares—including the fares of persons who have nothing to do with appellants' development—over the next 45 years. Juris. Stmt., 15-18. Appellees initially argue that such a shifting of burdens is "constitutionally indistinguishable" from common development exactions, such as required dedications of property for streets, which Justice Scalia

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no one else." Motion to Dismiss, 12. In fact, as appellees pointed out when seeking review in the California Supreme Court, the cases of appellants (and those similarly situated) affects "the City's right to approximately $21 million in local revenue . . . ." More important, a decision on the takings issue would have nationwide impact on the use of development fees to shift the cost of public services. Indeed, appellees' suggestion is particularly disingenuous given that the City already has enacted a new development fee intended to finance child care costs allegedly generated by downtown office development. Juris. Stmt., 12-13, 18 n.15.

[2] See Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 Law & Contemp. Probs. 51 (Winter 1987) ("One of the hottest issues in the land use arena is the expanding implementation of development exactions and impact fees"); Babcock, *Foreword to Exactions: A Controversial New Source for Municipal Funds*, 50 Law & Contemp. Probs. 1 (Winter 1987) (footnotes omitted) ("[e]very half decade or so, zoning comes forth with a hero, a *bette noire*, or an Armageddon of some sort. Five years ago, it was the consequences of taking and the Sherman Antitrust Act. Ten years ago, it was transfer development rights. Fifteen years ago, it was exclusionary zoning, and twenty years ago, it was landmarks. Today, it is exactions"); see also Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, *id.* at 69; Siemon, *Who Bears the Cost?*, *id.* at 115.

has found to be "in accord with our constitutional traditions . . . ." Motion to Dismiss, 14 (quoting *Pennell* v. *City of San Jose*, 108 S. Ct. 849, 862 (1988) (Scalia & O'Connor, JJ., dissenting)).

Appellees' analogy to typical subdivision exactions is inapt. The fact that appellants' office developments will generate additional transit demand and that the TIDF proceeds are used "to defray the cost of public transportation" tells only part of the story. Unlike the typical exaction which requires the developer to offset one-time capital costs (such as roads) that are *directly attributable* to the specific development, the exaction at issue here shifts a substantial portion of the general public cost of operating a mass transit system, which serves the entire city, to the relatively small class of new office developers. Juris. Stmt., 16-18; see *Nashville, Chattanooga & St. Louis Ry.* v. *Walters*, 294 U.S. 405, 430 (1935) ("user fees" or assessments properly may be assessed upon "particular property owners" only if the fees are based on benefits received).[3]

As Justice Scalia noted in *Pennell*, it is not the transfer of wealth per se but rather the "singling out" of particular individuals to bear public costs that gives rise to the "takings" claim. *Pennell*, 108 S. Ct. at 863; see *Walters*, 294 U.S. at 430; *Nollan* v. *California Coastal Comm'n*, 107 S. Ct. 3141, 3147 n.4 (1987). Appellants do not dispute that the City has a legitimate interest in attempting to recoup the costs of the increased municipal transit ridership. However, appellants do object to being targeted, for politically expedient reasons, to bear the

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[3] While the state courts have sustained the imposition of development fees used to finance various forms of capital improvements, we are unaware of any state or lower federal court decision that has upheld the use of such a fee to finance the ongoing costs of operating and providing public transportation or any comparable municipal service.

entire burden.[4] "It is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 147 (1978) (Rehnquist, J., dissenting); see *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 656 (1981) (Brennan, J., dissenting). If the appellees were truly interested in imposing the incremental costs of mass transit on those who are responsible for the problem, they could simply raise transit fares. Instead, they have imposed on a few taxpayers the entire cost of their discretionary policy judgment that public transit should be subsidized.

2. Appellees also argue that the "takings" issue is not worthy of review because the state courts already have concluded that the TIDF ordinance "*substantially advances*" the state's legitimate purpose of "alleviating the[] increased transit costs" created by new downtown developments, thus satisfying "the 'nexus' requirement imposed by *Nollan* v. *California Coastal Comm'n*, . . . 55 U.S.L.W. 5145 (June 26, 1987)." Motion to Dismiss, 16-

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[4] Appellees state that "the TIDF requires a class of 6,000 downtown property owners to pay the fee," thereby implying that the burden of the ordinance is widely distributed. Motion to Dismiss, 14 n.10, 20 n.13. This simply is a misstatement of fact. There are, in fact, a total of 6,000 property owners in all of downtown San Francisco. See Juris. Stmt. App., 72a (Russ Building suit on behalf of all property owners "within the TIDF district"). But, the City has subjected only a *small fraction* of those owners—by our estimate, less than 100 in all—to the TIDF ordinance.

Thus, while appellees are correct that the TIDF proceeds "may be used only for the provision of peak-period public transit service . . . to and from and within the downtown area," Juris. Stmt. App. at 117a; Motion to Dismiss, 15-16, that limitation on the use of proceeds does not answer appellants' constitutional objection. Virtually everyone who works in San Francisco will thus receive the benefit of the TIDF proceeds in improved service and subsidized transit fares, but only appellants, and those similarly situated, have been singled out to bear the cost of the subsidy.

18 (emphasis added).[5] This argument simply misapprehends the level of scrutiny imposed by the state courts. The trial court did not find that the ordinance was "substantially related" to any articulated governmental interest. Rather, in the words of the California Court of Appeal, the trial court found that the ordinance "was a 'debatably rational' development fee." Juris. Stmt. App., 28a. Similarly, the Court of Appeal made clear that it imposed only the lowest level of scrutiny; it held that the ordinance "was not arbitrary or unreasonable and was not an unconstitutional taking of plaintiffs' property." Juris. Stmt. App., 36a.

The finding by the California courts that the TIDF ordinance survives "rational basis" scrutiny only answers the preliminary inquiry—whether the government action in question serves a legitimate public purpose. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962). Once it is established that the governmental action serves a legitimate public purpose, there still remains the separate and distinct question whether there is a substantial nexus between the means chosen, *i.e.*, the transit impact fee, and the articulated governmental objectives. *Id.* The assertion by appellees—that the courts below concluded that "the *Nollan* requirement . . . was plainly met in this case"—simply has no basis. The courts below did not even address the issue of the required fit between the means and the end under the appropriate legal standard.

3. Finally, appellees suggest that, even if the state courts failed to undertake the appropriate level of review,

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[5] In *Nollan*, decided last Term, this Court made clear that the required nexus between a government interest and a land use regulation, such as a "development fee," is not satisfied by a mere showing that the government action is "rational." To the contrary, the City was required to demonstrate that the "taking" was "substantially" related to the actual government interest at stake. See *Nollan*, 107 S. Ct. at 3146-3148. Here, no such showing was made or even attempted.

this Court properly may conclude, on the present record, that the "[o]rdinance substantially advances a legitimate governmental purpose . . . and that the projections used by the City in calculating the amount of the fee were reasonable."[6] Motion to Dismiss, 24. However, the arguments pressed by the appellees do not support this position.

At the outset, it is striking that appellees offer no response whatsoever to appellants' specific arguments demonstrating why the expenses "captured" in the TIDF ordinance are not substantially related to the persons who are being required to pay the fee. Juris. Stmt., 17-18. Appellees suggest only that this Court not need concern itself with "adding a level of federal review on top of the scrutiny already given to the TIDF by the California courts." Motion to Dismiss, 21-22. But this answer only begs the question; if the California courts had applied the proper standard in their "rigorous" scrutiny (*id.* at 23) of the TIDF ordinance, the ordinance could not have been upheld.

Indeed, the opinions of the courts below acknowledge the absence of a sufficiently close "nexus" between the transit fee and the actual "costs" created by appellants' buildings. For example, the trial court held that it would uphold the ordinance despite the fact that the "general public would share the benefit of the contributed resources" or that "the exaction creates facilities which

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[6] Appellees argue that because the City could have repealed appellants' building permit to eliminate the burden that the buildings would place on the transit system, appellees can therefore place conditions on the permits to serve the same ends. Motion to Dismiss, 18 n.12. But this Court in *Nollan* made clear that the power to halt construction does not necessarily give rise to the power to "condition construction upon some concession by the owner, even a concession of property rights, that serves the same end." *Nollan*, 107 S. Ct. at 3148. If the fee is not substantially related to the end to be served but is instead "a forced contribution to general governmental revenues," then it constitutes a taking. See *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 163 (1980).

will not directly benefit the development." Juris. Stmt. App., *infra*, 78a. The Court of Appeal expressly recognized that the ordinance shifted some significant "public" cost to the appellants, but upheld such burden shifting as "rational[]." Juris. Stmt. App., *infra*, 34a-35a. In light of this recognition by the courts below that the TIDF ordinance shifts a substantial proportion of the "public" cost of mass transit growth to the relatively small class of new office developers, there is no basis for appellees' conclusory allegation that the constitutional question is "insubstantial."

As appellants noted—and appellees do not dispute—the TIDF ordinance is a novel attempt to impose on new developments alone the present value of future municipal services. Juris. Stmt., 13-15.[7] There is no difference in principle between the TIDF ordinance and a law that would impose on all new homebuilders the projected cost of police, fire and other municipal services for the new residents over the next 45 years. In either case, the takings issue is not, as appellees suggest, resolved simply by ensuring that proper accounting methodology is applied in the calculation of the municipal "costs" involved. The constitutional issue in the first instance is whether it is *ever* appropriate to single out new development to pay for municipal services via an exaction (rather than a generally applicable tax).[8] Appellants contend that, in

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[7] Despite a lengthy statement of facts, appellees fail to respond to appellants' characterization of the TIDF ordinance as a response to the legal (*i.e.*, Proposition 13) and political (*e.g.*, "special assessment districts" require property owner approval) constraints on the City's ability to obtain funding for continued subsidization of the transit system. Juris. Stmt., 3-5. The actual nature of the TIDF ordinance is reflected in the fact that the transit fee originally was presented to the Board of Supervisors as part of a "revenue package" formulated by City officials to supplement the transit budget in light of Proposition 13. See Trial Exhibit 502.

[8] There is no question that the purpose of the TIDF ordinance is to recoup and defray the operating costs of the San Francisco

the language of the *Nollan* case, the shifting of such costs to a discrete and identifiable class will rarely—if ever—be shown to be "substantially" related to the social problem that is being addressed. Juris. Stmt., 16-18.

4. This is not an appropriate case for the Court to "wait and see" how the issue develops. Millions of dollars in development fees already are being imposed. The city, county and state governments that are levying such fees, as well as the private parties who are paying them, have an immediate interest in determining when, and under what standards, such fees are constitutional. Given the inadequacy of the legal reasoning of the courts below, a dismissal of this appeal would offer little guidance to the public on the constitutional question, but it almost certainly will increase the use of such fees. In these circumstances, the questions presented require plenary consideration by this Court.

B. The TIDF Ordinance Constitutes An Unconstitutional Impairment of Appellants' Vested Rights

Appellees fail to dispute appellants' argument that the California Court of Appeal was correct in its determination that the notice given to the appellants was constitutionally inadequate and that the California Supreme Court erred in focusing on what the City "intended" and not what reasonably should have been understood. Appellees' only argument in response is that due process "notice" to appellants was unnecessary because the building permits were "legislative" acts, not individual "adjudicatory" acts to which due process applies. Appellees

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Municipal Railway. See Trial Exhibits 39 and 54. By the City's own admission, all downtown office (and retail and other establishments) generate ongoing identical ridership demands and operating costs—regardless of when they were built. Trial Exhibit 54. In light of this concession, the City's decision to "single out" a discrete group to subsidize transit—rather than to impose a generally applicable tax or fare increase—constitutes, at the very least, a shifting of public burdens which raises a serious question under the Takings Clause.

are incorrect in their statement that the grant (or denial) of a building permit is a legislative act under California law. See Juris. Stmt., 21 n.20. But, in any case, the question whether the notice provided was adequate in the circumstances is a substantial question of federal law which warrants review by this Court. See *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Tulsa Professional Collection Services, Inc.* v. *Pope*, 108 S. Ct. 1340 (1988).

CONCLUSION

For these reasons and those stated in the Jurisdictional Statement, probable jurisdiction should be noted.

Respectfully submitted,

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